

**BEFORE THE HEARING PANEL EMPOWERED BY  
THE STATE BOARD OF EDUCATION  
PURSUANT TO SECTION 162.961 RSMO.**

,

**Petitioner,**

**v.**

**SPRINGFIELD R-12 SCHOOL  
DISTRICT,**

**and**

**MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY  
EDUCATION**

**and**

**MISSOURI SCHOOL FOR THE BLIND**

**Respondents.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

The Hearing Panel, after hearing the evidence in this matter on January 22-24 and March 28-29, 2001, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

**FINDINGS OF FACT**

**I. The Parties**

**A. The Student**



1. The Parents of the Student have been residents of, and domiciled within the boundaries of the School District of Springfield, R-12 (“District”) during all times relevant to this due process proceeding. During all such times, the Student has been a resident of the District as defined by Section 167.020 RSMo and thereby eligible to attend school in said District. The Student’s date of birth is April 29, 1984. (*Stip.* ¶ 1).
2. The Student is represented by Sharon Carden Street, P.O. Box 250418, Little Rock, Arkansas 72225-0418.

**B. The District**

3. The District is an urban school district organized pursuant Section 162.461 *et seq.* RSMo. (*Stip.* ¶ 10). The special education program in the District is directed by George Wilson, Director of Special Education. The program employs approximately 220 certified staff members and 130 paraprofessionals at 55 sites within the District. (*Testimony of G. Wilson, Tr. pages 186-188*)
4. During all times relevant to this proceeding the following persons were employed by the District and provided educational services to the Student:

Dr. Arnold Greve	Superintendent
Dr. Jack Ernst	Superintendent
Dr. Janice Duncan	Associate Superintendent
George Wilson	Director of Special Education
Ben Franklin	Assistant Director of Special Education
Phyllis Wolfram	Supervisor of Special Education
Donna S. Prouty	Supervisor of Special Education
Marie Wohler	ECSE Supervisor
Ann Boles	Process Coordinator
Mary Dailey	Classroom Teacher
Kathy Kover	Paraprofessional
Patsy Hines	Paraprofessional/Licensed Practical Nurse
Diane Freitas	Occupational Therapist
Janet Mhire	Occupational Therapist
Susan Lynch	Speech/Language Pathologist
Dr. Les Dean	School Psychologist

(*Stip.* ¶ 11)

5. The District is represented by Ransom A Ellis, III of the law firm of Ellis, Ellis, Hammons & Johnson, P.C., 901 St. Louis Street, Springfield, Missouri 65806-2505.



### **C. The State**

6. The Missouri Department of Elementary and Secondary Education (“DESE”) is a Department of the State of Missouri. (*Stip. ¶13*)
7. During all times relevant to this proceeding the following persons were employed by DESE:

Dr. Kent King	Commissioner of Education
Dr. Robert E. Bartman	Former Commissioner of Education
Dr. Stephen Barr	Assistant Commissioner of Education – Division of Special Education
Dr. John Heskett	Former Assistant Commissioner of Education – Division of Special Education
Heidi Atkins Lieberman	Legal Counsel/Child Complaint Coordinator
Melodie Friedebach	Coordinator — Division of Special Education
Rick Hutcherson	Coordinator — Special Education Administration
William R. Daly	Director — Grants and Application Processing

(*Stip. ¶14*)

8. The Missouri School for the Blind (“MSB”) is a school established by Missouri Statutes to serve students referred to the State Board of Education by local school districts who may require such services to provide a free appropriate public education. MSB is operated by DESE and provides education, residential and outreach services for students in the State of Missouri. (*Stip. ¶15*) While MSB has previously served deaf-blind students in a residential setting, there is currently no residential program in place for deaf-blind students. (*Testimony of T. Culliton, Exh. D-86, pages 54-56*)
9. During all times relevant to this proceeding the following persons were employed by MSB:

Dr. Yvonne Howze	Superintendent
Thomas F. Culliton	Principal — K-12 Education Division
Dr. Betty J. Davidson	Principal — Multiple Handicapped Deaf-blind Division
Marsha Bryant	Director — Residential Program
Darlene Ivy	Supervisor — Student/Family Services
Kenneth Mitchell	Supervisor — Clinical and Ancillary Services
Karen Eckert	Vision Supervisor
Jenny Mascheck	Vision Supervisor



(*Stip.* ¶16)

10. DESE and MSB are represented by the Missouri Attorney General's office, Gary L. Gardner, Assistant Attorney General, Office of the Attorney General of Missouri, P.O. Box 899, Jefferson City, Missouri, 65102.
11. Perkins School for the Blind ("Perkins") is a private school located in Watertown, Massachusetts which serves students who are blind, visually handicapped, deaf-blind, or multi-handicapped blind. Perkins has 200 students, including 53 deaf/blind students and 700 staff personnel. (*Tr.* 811, *Ins.* 18-22)

#### **D. The Hearing Panel**

12. The Hearing Panel in the proceeding are:

Pamela S. Wright, Chairperson  
Dayna Deck, Hearing Panel Member  
Dr. Diane Golden, Hearing Panel Member

#### **II. Time Line information and Procedural Background**

13. On or about June 30, 2000, the Student's Parents sent a letter to Heidi Atkins Lieberman, Legal Counsel for Special Education Services, DESE, requesting a due process hearing contesting the District's June 2, 2000 proposal to change Student's educational placement from Perkins to MSB. The request for due process named the District, DESE and MSB as Respondents. The request for due process hearing was received by DESE on June 30, 2000. (*Exh. D-52.*; *Stip.* ¶19)
14. DESE calculated the initial time line for the issuance of an opinion to be August 14, 2000. On August 10, 2000, the parties requested an extension of the time line to October 27, 2000. On September 1, 2000, the parties requested an extension of the time line to November 22, 2000. On October 31, 2000, the parties agreed to an extension of the time line to February 23, 2001. After the third day of hearing on January 24, 2001, the parties requested an extension of the time line to May 1<sup>st</sup>. At the conclusion of two additional days of hearing on March 29, 2001, the parties requested an extension of the time line to May 13, 2001. On May 3, 2001, Student's counsel filed her brief and requested an extension of the time line to May 30, 2001. The Hearing Panel issues its opinion within the new deadline.
15. On or about September 14, 2000, DESE and MSB filed a Motion to Dismiss with the Hearing Chairperson requesting that DESE and MSB be dismissed as parties to the due process proceeding. (*Exh. D-69*) On September 18, 2000, DESE and MSB filed a Motion to Disqualify Parents' Hearing Panel Member. On or about October 23, 2000, the Hearing Chairperson issued an Order which denied the Motions to Dismiss and to Disqualify filed



by DESE and MSB. (*Exh. D-79; Stip. ¶20*)

16. The parties exchanged exhibits more than five business days in advance of the hearing and the parties stipulated to the admission of the exhibits into evidence as well as the depositions taken in advance of the hearing.
17. Parents made an oral Motion for Directed Verdict on January 24, 2001 and in written form on March 5, 2001. The Hearing Panel denied the Motion on March 9, 2001.
18. Exhibits submitted by Parents and the District were entered into the record by mutual agreement. The Hearing Panel received three additional Exhibits into evidence from the parties: (1) Stipulation, (2) Proposed Rule Making re Extraordinary Cost Fund, and (3) Remarkable Conversations, a Perkins report.

### **III. The Issues of the Due Process Proceeding**

19. The issues to be resolved by the Hearing Panel are as follows:
  - (A). Assuming that DESE/MSB had an obligation to provide a free appropriate public education, did DESE/MSB have a representative with authority to commit agency resources at the IEP meeting held on June 2, 2000?<sup>1</sup> If not, was the failure by DESE/MSB to have a representative present at the IEP meeting a procedural violation of IDEA?
  - (B). Whether the proposed placement of the Student at MSB for School Year 2000-01 is the appropriate placement for Student to receive a free appropriate public education?
  - (C). Whether the Student has been a severely handicapped child within the provisions of Section 162.735 RSMo 2000 since, at least, the beginning of School Year 1998-99?

### **STUDENT'S DISABILITIES**

20. The February 28, 1998, Diagnostic Summary prepared by the District for the Student lists her categorical disability as "deaf-blind." The Diagnostic Summary states that the basis for the determination was as follows:

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<sup>1</sup>An Individualized Education Program ("IEP") is a customized model of a child's curriculum and academic goals. One of the IEP purposes is to provide periodic monitoring of the child's progress. U.S.C. §1414(d).



“Based on the evaluation information [the Student] meets the eligibility criteria to be diagnosed as deaf-blind. It has been determined by the multi-disciplinary team that [the Student] has both visual and hearing impairments occurring in combination. [The Student] exhibits significant educational problems caused by the multiple impairments. . . .” (*Exh. 17, page 97; Stip. ¶4*)

21. The June 4 -5, 1996, Evaluation Report by the deaf-blind evaluation team at Perkins School for the Blind (*Exh. D-7*) concerning the Student states that the Student’s disabilities are as follows:
- A. Hearing impairment (*Exh. D-7, pages 0359 and 0380*);
  - B. Visual impairment/legally blind (*Exh. D-7, page 0359*);
  - C. Cognitive/developmental delays (*Exh. D-7, page 0360*);
  - D. Physical anomalies (repaired cleft lip and palate, ventricular septal defect, skeletal malformation and oral/facial anomalies) (*Exh. D-7 pages 0360, 0370 and 0385*);
  - E. Significant aggressive, self-abusive and non-compliant behaviors (*Exh. D-7, pages 0360 and 0393*);
  - F. Severe language delays (*Exh. D-7, page 0374*)

(*Stip. ¶5*)

22. The January 19, 2000, Report concerning the Student by Dr. Nalton F. Ferraro, an orofacial physician at Children’s Hospital in Boston, Massachusetts states that the Student’s disabilities are as follows:

“[The Student] is 14 years of age and has had a history of ear infections and since September episodic very painful facial swelling. She has a CHARGE diagnosis with significant developmental delays. She also has obsessive compulsive disorder and episodes of self-injurious behavior. . . .She also has visual and hearing impairment.” (*Stip. ¶6*)

23. The Student has a disabling condition which has been determined by competent professional evaluation. (*Testimony of M. Zatta, Tr. page 793, lns. 15 - 18*)
24. The Student is a child under the age of twenty-one years who has not completed an approved high school program and who, because of mental, physical, emotional or



learning problems, requires special educational services in order to develop to her maximum capacity. (*Stip. ¶7d* )

25. Since at least the beginning of school year 1998-99, the Student has needed a residential placement because she is unable to benefit from or meaningfully participate in programs in the public schools because of her disabilities. (*Stip. ¶8; Testimony of M. Zatta, Tr. p 793, lns. 19-25; page 794, lns. 1-6*)

#### **ATTENDANCE AT DISTRICT'S SCHOOLS FROM 1990-1998**

26. The Panel sees no need to recite Student's lengthy history with the District on a school year by school year basis. We generally find that Student attended schools in the District from kindergarten beginning in September 1990 until her parents removed her from school in February 1998.
27. Throughout Student's attendance in the District schools, both the District and the parents hired many consultants to advise the School District faculty to evaluate and recommend the appropriate teaching methods for Student. Two frequent consultants providing input for the Student were Linda Van Eck Niedringhaus, MSB's Director of Outreach Services and Stephanie McFarland from Perkins.<sup>2</sup>
28. During Student's attendance in the District's schools, the Parents and the District disagreed frequently on Student's progress, the necessary services to be provided and the appropriate instruction for her. For example, the Parents filed for Due Process on August 31, 1995 and again on September 16, 1996. The parties reached a settlement on both Requests for Due Process on July 3, 1997. The terms of the settlement agreement provided that the District would hire a deaf/blind consultant, Susan Marks n/k/a Bruce, for teacher training and oversight of the program and Dr. Ed Hammer to assist with evaluation and behavior programming in exchange for a release of the District from any claims asserted in the Requests for Due Process and a pending federal civil rights action. (*Dist. Ex. 29*)
29. Despite extensive assistance from consultants in the 1997-1998 school year, Student's situation at school deteriorated. On November 5, 1997, Student was suspended for behavior. (*Parents Ex. Vol I, pages 398-401*) On December 22, 1997, the District reported Student to juvenile services for her behavior. On December 29, 1997, the District drafted a behavior plan that called for reducing Student's school day by half. (*Parents Ex. Vol II, page 391*)

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<sup>2</sup>On June 4, 1996, Parents had Student evaluated at Perkins School for the Blind. (*Parents Ex Vol II, pages 209-248*)



30. On February 19, 1998, Student stopped attending school. (*Parents Ex. Vol II, pages 408-409*) She did not return to classes. Student was injuring staff and herself. She was in crisis. (*Testimony of P. Wolfram, Tr. page 51, lns 21-25; page 52, lns 1-7*)<sup>3</sup>
31. By February 1998, the District had exhausted all reasonable efforts to serve the Student's special education needs within the District. (*Stip. ¶18*)

### **RESIDENTIAL PLACEMENT OPTIONS FOR 1998-1999 SCHOOL YEAR**

32. Shortly after the Student was removed from attending classes in the District in February 1998, the Parents and the District began discussing the possibility of placing the Student in a residential placement. (*Testimony of P. Wolfram, Tr. pages 54 - 55*) On February 26, 1998, a telephone conference was held between Sharon Streett and Ransom Ellis, III regarding possible alternative appropriate placements for the Student including Tucson, Arizona; Perkins School for the Blind; Overbrook; and, Alabama Institute For the Blind. (*Testimony of G. Wilson, Tr. pages 196-197*)
33. On February 27, 1998, the Parents advised the District by letter of their intent to make a unilateral placement. (*Parents Ex. Vol II, pages 287-288*)
34. On March 4, 1998, George Wilson sent a letter to the Parents regarding placement options. In this letter Mr. Wilson stated in pertinent part:

“While I have acknowledged your belief that the MSB program cannot meet [the Student's] needs, the District has no basis for questioning the appropriateness of the services there. Given also that the MSB program is located much closer to home than the options you referenced, the District's position is that this option must be explored first.

(*Exh. D-9; Testimony of G. Wilson, Tr. pages 198-199*)

35. On March 5, 1998, Darlene Ivy of the District sent a letter to Linda Marlin of MSB regarding MSB referral information. (*Exh. D-10; Testimony of P. Wolfram, Tr. page 56*)

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<sup>3</sup> A complete description of the Student's behaviors is contained on the Summary of [the Student's] Educational Program. (*Exh. D-92; Testimony of P. Wolfram, Tr. pages 53 - 54*)



36. On March 10, 1998, Linda Marlin called Darlene Ivy and left the following voice mail message:
- “This is Linda Marlin in Springfield, Missouri. My supervisor George Wilson wanted me to call you and let you know that we are initializing a referral to MSB’s Deaf-Blind Program for [the Student] and you should be receiving this information very soon. We would like to expedite this process. You do not need to return my phone call. Mr. Wilson just wanted me to call you to let you know the student’s name.”
37. On March 11, 1998, Phyllis Wolfram sent a letter to Dr. Yvonne Howze, with attachments, referring the Student to MSB. (*Exh. 13; Testimony of P. Wolfram, Tr. pages 57-59*) Dr. Howze testified that following receipt of this referral letter and the attached materials, which she opened, she received a telephone call from George Wilson requesting that she not distribute the information because it had personally identifiable information about the Student contained in it. Mr. Wilson further requested that the materials be returned to the District. (*Testimony of Y. Howze, Exh. D-88, pages 22-25*)
38. Between March 11 and March 23, 1998, George Wilson called Dr. Yvonne Howze and asked that she return the information about the Student which was contained in Phyllis Wolfram’s letter dated March 11, 1998, (*Exh. 13*), because there was a question about whether the District could send the personally identifiable information about the Student to MSB. (*Testimony of P. Wolfram, Tr. pages 59-60*)
39. On March 23, 1998, Phyllis Wolfram sent a letter to Dr. Yvonne Howze, with attachments, referring the Student to MSB. (*Exh. 15, pages 0045-0060*) (*Testimony of P. Wolfram, Tr. pages 60-61*) Dr. Howze testified that the second referral she received had been redacted to remove the name and personally identifying information about the student. (*Testimony of Y. Howze, Exh D-88, pages 22-25*) However, Dr. Howze was aware that the information in the second referral was about the Student. (*Testimony of Y. Howze, Exh. D-88, pages 25-26*)
40. On March 24 - 27, 1998, a MSB Admissions Routing Request Form was prepared and circulated for the Student. (*Exh. 15, page 0043*) Dr. Betty Davidson testified that she wrote the following on the form:
- “need more info on eye condition. We have a program; She will be our only deaf/blind student thus appropriate socialization will not be possible. We need a team to evaluate behavior.”
- (*Exh. 15, page 43, Testimony of B. Davidson, Exh. D-87, page 13, lns. 9-13*)



41. On March 30, 1998, a telephone conference was held between the Parents, Sharon Streett, George Wilson, Phyllis Wolfram and Ransom Ellis, III regarding placement options for the Student including the District, Wichita, Overbrook, Alabama Institute, Arizona, Perkins, MSB or home school. (*Exh. D-11; Testimony of G. Wilson, Tr. page 199*)
42. On April 22, 1998, Darlene Ivy sent a letter to the District confirming the referral of the Student to MSB. (*Exh. 14; Testimony of P. Wolfram, Tr. pages 62-63*)
43. On May 18, 1998, the Parents authorized the District to send specified records to which they had no objection to MSB. (*Parents' Ex. Vol III, pages 389-90*)
44. On June 8, 1998 a conference call was held between the Student's Parents, Sharon Streett, George Wilson, Phyllis Wolfram and Ransom Ellis, III regarding placement considerations. During this conversation the Parents indicated that they would allow MSB to conduct an observation of the Student. (*Exh. D-16; Testimony of G. Wilson, Tr. page 306*)
45. On June 29, 1998, MSB conducted an on-site observation of the Student with MSB team members Vanessa Joplin, Barb Griffen, Lynn Navy and Karen Eckert. (*Exh 23*)
46. On and after July 1, 1998, during school year 1998-99, the following events occurred concerning the possible placement/referral of the Student to the Missouri School for the Blind (MSB), the Missouri School for the Deaf (MSD) or Perkins School for the Blind (Perkins):
  - A. On July 2, 1998, the MSB Admission Review Team met and prepared its Admission Review Team Report regarding the request for admission of the Student. (*Exh. 15*) The Admission Review Team consisted of Tom Culliton, Dr. Betty Davidson, Marsha Bryant and Darlene Ivy. (*Testimony of T. Culliton, Exh. D-86, page 19, lns. 4-14*)
  - B. At the meeting on July 2, 1998, the Admission Team voted unanimously to recommend to Dr. Yvonne Howze that the referral of the Student not be accepted by MSB. The Admission Team prepared an Admission Team Report (*Exh. 15, page 44*) and forwarded it to Dr. Howze. (*Testimony of T. Culliton, Exh. D-86, page 25*) Two of the team members and Dr. Howze testified concerning their reasons for not accepting the Student into the MSB program:
    - 1) Tom Culliton testified that he voted not to accept the referral of the Student because he felt that MSB was "not the most appropriate school to provide the needs for that . . . student," in that MSB did not have students who could communicate with the Student in sign language. (*Testimony of T. Culliton, Exh. D-86, page 42, lns. 17-21, pages 43-44*)



2) Dr. Betty Davidson testified that “[a]t the time we had no one who could sign, no peers that could sign to her, no one in the dormitory that could sign to her. . . . we didn’t have these things in place and . . . we at this time [didn’t] have a program that she would fit into that would adequately serve her.” (*Testimony of B. Davidson, Exh. D-87, page 18, lns. 3-23*)

3) Dr. Yvonne Howze testified that on July 2, 1998, she received a copy of the Admissions Team’s report (*Exh. 15, page 2*), reviewed and accepted the conclusions contained in it. (*Testimony of Y. Howze, Exh. D-88, pages 34-35*)

C. On July 2, 1998, Darlene Ivy sent a letter to Phyllis Wolfram declining to admit the Student. (*Exh. 9; Testimony of T. Culliton, Exh. D-86, pages 29-30; Testimony of G. Wilson, Tr. pages 309-310*) The letter states in pertinent part:

“Our Admissions Team has reviewed the referral information you sent on March 23, 1998, of an unidentified student for admission to our school. Our Team’s decision was not to admit, as we do not have an appropriate program of services for this child whose primary disability is deaf/blindness. Our Superintendent, Dr. Yvonne Howze, has reviewed and accepted the Team’s recommendation.

The Team further recommended that consideration for placement of this student might be our sister school, The Missouri School for the Deaf (MSD). Dr. Alan Ensor, Outreach Director, coordinates admissions at MSD, and can be reached at: 573-592-4000. . . .”

The letter was received by the District on July 7, 1998. (*Testimony of P. Wolfram, Tr. pages 63-64*) With respect to the recommendation by MSB that the Student be referred to MSD, Dr. Yvonne Howze testified as follows:

“ . . . [The Student] had at that time some sign language capability. None of our kids signed. They used braille. They couldn’t even see her sign. She would have had no peers to interact with, and at that time we . . . had just graduated [our deaf-blind] student. . . We had staff who were getting ready to depart because we didn’t have any deaf/blind kids and . . . they weren’t coming . . . and we didn’t have any staff. . . . [T]he School for the Deaf have children who sign, staff who are trained to work with children with deafness. . . but communication was the major concern that we had, that there would be no opportunity for her to use her communication skills.”

(*Testimony of Y. Howze, Exh. D-88, page 36, lns. 7-25; page 37, lns. 1-2*)



D. On July 2, 1998, and July 3, 1998, Parents sent letters to Dr. Yvonne Howze. (*Exhs. 19 and 20*) These letters apparently crossed in the mail with MSB's July 2 letter. (*Exh. 9*) Dr. Yvonne Howze testified that she, Linda Van Eck, Dr. Betty Davidson and Darlene Ivy met to discuss the information in the letters and compare it with the other information that had been received about the Student. (*Testimony of Y. Howze, Exh. D-88, page 37*)

E. On July 13, 1998, Father of Student had a telephone conversation with Phyllis Wolfram regarding the referral of the Student to MSB. During that conversation Ms. Wolfram read the letter from MSB to the District dated July 2, 1998 (*Exh. 9*) to Father. (*Exh. D-18; Testimony of P. Wolfram, Tr. pages 66-67*)

F. On July 14, 1998, MSB prepared a second Admissions Routing Request Form for the Student. (*Exh. 21, page 129*) The additional information concerning the Student was attached to the Admissions Routing Request Form (*Exh. 21, pages 130-226*), and was reviewed by Marsha Bryant, Kenneth Mitchell and Dr. Betty Davidson. (*Testimony of T. Culliton, Exh. D-86, pages 36-37*)

G. On July 23, 1998, Father had a telephone conversation with Phyllis Wolfram regarding the District's intent to refer the Student to the Missouri School for the Deaf "MSD") in accordance with the suggestion made by MSB in their letter dated July 2, 1998 (*Exh. 9*) (*Exh. D-19; Testimony of P. Wolfram, Tr. pages 67-68*) That same day, Phyllis Wolfram confirmed her conversation with Father in a letter. The letter states in pertinent part:

"We also discussed making a referral to Missouri School for the Deaf (MSD) since this was the recommendation given to us by Missouri School for the Blind (MSB). During our conversation you seemed to agree with our rationale for making the referral. I then asked you to allow us to have MSB release records to MSD in order to facilitate this referral. You denied my request. After further discussion I requested that you allow us to release the current diagnostic summary, which includes dissents, the IEP, and documentation from MSB regarding the observation they conducted. . . ." (*Exh. D-20; Testimony of P. Wolfram, Tr. page 69*)

H. Between July 14 and July 29, 1998, a second MSB Admissions Routing Request Form was prepared and circulated for the Student. (*Exh. 21*) After this form was circulated the MSB Admissions Team did not reconvene to discuss admission of the Student. (*Testimony of B. Davidson, Exh. D-87, page 24*)

I. On July 24, 1998, a telephone conversation took place between George Wilson



and Melodie Friedebach regarding MSB's refusal to accept the Student and the Student's Parents' request for placement at Perkins. (*Exh. D-21; Testimony of G. Wilson, Tr. page 311*) Mr. Wilson testified as follows:

"The reason for the call was to, we found it very curious the response that we had gotten from Missouri School for the Blind. . . I felt that certainly this was a severely disabled student that would be eligible to receive services, so we contacted the state department to ask them about that situation and specifically what was their responsibility in these circumstances, the circumstances where we had a student who had very significant needs and where the district was unable to meet her needs in the local school district.

. . . [Ms. Friedebach] indicated initially that, . . . , the state schools don't accept all the referrals that are made to them.

I responded that in my experience the ones that they had not accepted were students whose needs, . . . could be best met in the local school district. In this circumstance, that was not the determination.

The determination was they didn't have a program for her, did not suggest that the student's needs could be met in the local district, but rather suggested that we refer to some other state agency, state school." (*Testimony of G. Wilson, Tr. page 311, lns. 14-25; page 312, lns. 1-17*)

J. On July 30, 1998, Father wrote a letter to Phyllis Wolfram. In the letter the Parents authorized the District to release certain information concerning the Student to MSD. in connection with the referral of the Student to MSD. (*Exh. D-22; Testimony of P. Wolfram, Tr. pages 69-70*)

K. On August 5, 1998, George Wilson wrote to Allan Ensor, Director, Clinical and Ancillary Services for MSD concerning the referral of the Student to MSD.

L. On August 5, 1998, Father wrote to Allan Ensor concerning the Student's referral to MSD.

M. On August 5, 1998, a telephone conference was conducted between Father, George Wilson and Phyllis Wolfram regarding the Student's acceptance at Perkins and the Parents' cooperation with the District's referral of the Student to MSD (*Exh. D-23; Testimony of G. Wilson, Tr. pages 313-314*)



N. On August 5, 1998, George Wilson sent a letter to Father regarding the referral of the Student to MSD., which had been discussed during the telephone conversation that day. (*Exh. D-24; Testimony of G. Wilson, Tr. page 314*)

O. In August, 1998, a telephone conference took place between Dr. John Heskett, George Wilson and Phyllis Wolfram regarding MSB's acceptance of the Student; an anticipated letter from Dr. Howze; and, the Student's eligibility for reimbursement through the Extraordinary Cost Fund if she attended Perkins. Phyllis Wolfram testified as follows concerning this telephone conversation:

"The conversation with Dr. Heskett indicating to us that MSB could provide a program for [the Student], and that MSB did have a deaf/blind program and that would be, in looking at a residential placement, that would be an appropriate placement for [the Student], and in the course of that conversation he indicated that he would have some conversation with Yvonne and support them and whatever to make that program, and so we were anticipating to receive a letter that yes, [the Student] would be accepted at the Missouri School for the Blind." (*Testimony of P. Wolfram, Tr. page 71, lns. 17-25; page 72, ln. 1*)

George Wilson testified as follows concerning the conversation:

". . .[Dr. Heskett] agreed that the rejection letter from Missouri School for the blind was curious, and he was having difficulty understanding why she would not be eligible for services to Missouri School for the Blind. He indicated to me that he would follow up on that issue and contact me again. . . . Dr. Heskett in a follow up to the earlier conversation that we had . . .[indicated] . . . that we should not pursue the Missouri School for the Deaf eligibility determination, that it was his impression, and I don't believe that he stated to us at that time that MSB would accept [the Student], but . . . the nature of the conversation led us to believe that he had spoken with Dr. Howze, and that we should anticipate another letter from her regarding [the Student's] eligibility to attend Missouri School for the Blind.

We came away from that conversation with an expectation that [the Student] would be accepted at Missouri School for the Blind."

(*Testimony of G. Wilson, Tr. page 316, lns. 3-9; Tr. page 318, lns. 5-22*) While Dr. John Heskett did not recall specifics about his conversations with the District, he testified as follows:



“... there [were] a series of conversations that took place about eligibility for admittance to the Missouri School for the Blind, and as I best recall, the last statement that came from the school for the blind was that [the Student] met the eligibility criteria as expressed in the state plan and could be considered as a placement option for the IEP committee to review in making a final determination of placement. That is my best recollection of this thing.” (*Testimony of J. Heskett, Tr. page 216, lns. 4-14*)

P. On August 28, 1998, George Wilson wrote a letter to Father regarding the Student. In this letter Mr. Wilson states in pertinent part:

“... We have proposed an appropriate program for [the Student] at Carver. However, due to your expressed opinions and beliefs regarding those services, we further agreed to facilitate a referral to MSB. While you agreed to the referral, you also rejected that program and every other program in Missouri as also inappropriate for [the Student]. . . .Following MSB’s recommendation to refer [the Student] to MSD., we did seek your cooperation in that referral also. . . .You have informed us that the only placement you believe is appropriate for [the Student] is the Perkins School for the Blind. . . .You are aware that MSB’s initial response was that they ‘do not have an appropriate program of services’ at this time. My last understanding regarding MSD was that they were waiting for your response to their invitation to visit MSD. . . .You are aware that [the Student] is currently being considered for eligibility to attend a state operated program. We anticipate a final determination regarding her eligibility within the next ten days. At that time we will discuss those or other options with you.”

The letter contained a Notice of Action rejecting a request by the Parents that it provide compensatory services to the Student. (*Exh. D-26; Testimony of G. Wilson, Tr. pages 318-319*)

Q. In or around August 1998, Dr. Yvonne Howze had a conversation with Dr. John Heskett concerning the Student. During this conversation, Dr. Howze told Dr. Heskett:

1) that “MSB had been caught in the middle of a mess that wasn’t [theirs].” (*Testimony of Y. Howze, Exh. D-88, page 54, lns. 9-12*)

2) that she “thought it was just an old boy’s game between Dr. Heskett and Mr. Wilson, and that whatever deal they were cutting had nothing to do with



MSB.” (*Testimony of Y. Howze, Exh. D-88, page 54, lns. 15-19*)

3) that “MSB was not the most appropriate or least restrictive environment for [the Student], and that [MSB’s] recommendation would be to seek either assistance through the Missouri School for the Deaf, and if they felt that they were not the most appropriate or least restrictive, then to consider Perkins.” (*Testimony of Y. Howze, Exh. D-88, page 54, lns. 20 - 25; page 55, ln 1*)

#### **ATTENDANCE AT PERKINS FOR SCHOOL YEAR 1998-1999**

R. In September, 1998, the Student entered Perkins School for the Blind. (*Testimony of P. Wolfram, Tr. page 65*) By this point in time the District personnel believed that the Student needed a residential placement. (*Testimony of P. Wolfram, Tr. pages 72-73*) P. Wolfram testified that she reached this conclusion because:

1) The Student’s “behavior had gotten to a point where she was hurting herself and attempting to hurt others around her. Staff was intervening with her on a minute-by-minute basis at school.” (*Testimony of P. Wolfram, Tr. page 74, lns. 10-14*);

2) The District was no longer being successful in communicating with the Student. (*Testimony of P. Wolfram, Tr. pages 74-75* );

3) The Student had some significant physical and mental health problems including consistent ear infections, sinus infections and obsessive compulsive behaviors. (*Testimony of P. Wolfram, Tr. page 75*).

S. On September 14, 1998 Dr. Yvonne Howze wrote a letter to George Wilson. (*Exh 8*) This letter states in pertinent part:

“As a follow up to your phone call, I am submitting a response to your questions about what program of services MSB would need to provide for [the Student].

Our efforts will require the establishment of a program which will provide around-the-clock communication for [the Student]. A behavior management program will also need to be established for her, based on our own onsite observations of her behavior, recent family feedback, and the most current assessment and supporting documentation and information. While we do not agree that MSB would be the final placement for this child’s least restrictive environment, we are agreeable to assisting with [the Student’s] programming at this time so that she can have a consistent, well-



rounded and caring environment in which to thrive. Please know we are available to you as a resource should you decide to serve [the Student] within the Springfield district.”

Dr. Howze testified that this letter was not a letter accepting the Student into MSB’s program. (*Testimony of Y. Howze, Exh. D-88, pages 42-43; page 52, lns. 14-19*) Rather, Dr. Howze testified that the letter was an explanation of the program MSB would need to have in order to properly serve the Student. (*Testimony of Y. Howze, Exh. D-88, pages 41-42*) However, Dr. Stephen Barr testified that when he reviewed the letter in 2000, he understood the letter to constitute a letter accepting the Student as a student at MSB. (*Testimony of S. Barr, Exh. D-85, page 43, lns. 2-6; page 44, lns. 15-21*) Because of his conversations with Dr. Heskett, George Wilson interpreted the letter to accept the Student into the program at MSB. (*Testimony of G. Wilson, Tr. page 320*) At the time the letter was received by the District, the Student had already been enrolled and was attending Perkins. (*Testimony of P. Wolfram, Tr. page 72*)

T. On September 21, 1998, George Wilson wrote a letter to Father regarding placement of the Student at MSB. In that letter Mr. Wilson states in pertinent part:

“We have received information from the Missouri School for the Blind that they are able to design and implement an appropriate educational program for [the Student]. This information is, I know, different from their earlier notice. However, they have now acknowledged their willingness and ability to appropriately serve [the Student’s] needs.

As you know, it is our position [the Student] could be appropriately served within the Springfield R-12 School District. However, you have rejected that option. We may now consider the Missouri School for the Blind as a placement option for [the Student]. Despite your previous determination that MSB would not be an appropriate placement option for [the Student], I would encourage that you reconsider this option at this time.” (*Exh. D-27*)

U. On October 5, 1998, a telephone conference took place between Dr. John Heskett and George Wilson regarding the Student’s eligibility for reimbursement through the Extraordinary Cost Fund. George Wilson testified as follows concerning this conversation:

“... we had discussed the notice that we had received from the Missouri School for the Blind ... I indicated to him that that had been received by us, and my impression was that she had been accepted there, that that was one option that we could consider at



the time, and I also explored with him if the team were to consider the Perkins placement as another option, whether or not the district would be eligible to recoup expenses related to that placement under the extraordinary cost fund.” (*Testimony of G. Wilson, Tr. page 322, lns. 18-25; Tr. page 323, lns. 1-2*)

V. On October 6, 1998, the Parents filed their Third Due Process Request with DESE. (*Exh. D-28*) On June 4, 1999, the Student, Parents and District entered into their Second Settlement Agreement. (*Exh. 30*) As a result, the Parents withdrew their Third Due Process Request. (*Testimony of G. Wilson, Tr. pages 323-330*)<sup>4</sup>

W. On November 4, 1998, a telephone conference took place between the Perkins staff, Student’s Mother, George Wilson and Ransom Ellis, III regarding the Student’s educational program at Perkins. (*Exh. D-30; Testimony of G. Wilson, Tr. pages 321-322*)

X. On November 11, 1998 George Wilson sent a facsimile note to Mary Zatta, Perkins, enclosing copies of the District’s IEP forms. (*Exh. D-31; Testimony of G. Wilson, Tr. pages 326-327*)

Y. November. 24, 1998 Student’s IEP team at Perkins met to develop her first regular IEP at Perkins. Student’s 37 page IEP focused on expanding or increasing receptive communication skills across all settings, expressive and receptive pragmatic language skills, functional reading skills, knowledge of concepts across settings (knowledge transfer ), communication modes other than behavior, time and money skills, number concepts, peer and adult interactions, appropriate behavior across settings, eating skills across settings, personal hygiene skills, cooking skills, cottage chore skills and cooperative work skills, dressing, undressing and clothing care skills (laundry), pre vocational activities such as independence in entering/exiting work setting, minimal assistance in sorting, packaging and tool use, care of hearing aides and hearing aide use skills, recreation and leisure skills (fitness, playtime, group games), and community activity skills (group trips into community), safety and mobility skills, swimming, games and fitness skills, and on decreasing inappropriate behaviors across settings.

Z. Laurie Denno, Perkins’ behavioral psychologist, shared a behavioral consultation report with the IEP team related to Student’s behavior and treatment plan based on parent data and techniques. This report discussed decrease in target behaviors since enrollment, medication for obsessive compulsive behaviors, and strategies for target behaviors. The report noted that behavioral treatment was developed with extensive help from parents regarding their experience. (*Parents Ex. Vol. IV, page 62, Denno Behavioral Report*)

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<sup>4</sup>The Settlement Agreement essentially provided that the Parents released the District for any claims of any responsibility the District may have had under IDEA or the State Plan for School Years 97-98; 98-99 and 99-00. Parents also discharged District for any claim of attorney’s fees and costs for those same periods. (*Exh. 30*)



AA. On February 17, 1999, a telephone conference took place between George Wilson and Dr. John Heskett regarding expenses which could be reimbursed through the Extraordinary Cost Fund. Following the conversation, Dr. Heskett provided Mr. Wilson with a copy of the Runzheimer Guide, which was used by the State to determine the appropriateness of expense reimbursements. (*Exh. D-32*)

BB. Perkins provided progress reports in March and for the June, that indicated Student was making progress, particularly in the areas of communication and behavior. (*Parents Ex. Vol. IV, pages 69-96, & pages 140-148, Progress Report*)

CC. On May 24, 1999, a telephone conference took place between George Wilson, Phyllis Wolfram and Melodie Friedbach regarding DESE's agreement to recognize the District's review of Perkins' IEP. (*Exh. D-35*)

DD. On June 4, 1999, the Student's IEP was completed. (*Exh. 21; Testimony of P. Wolfram, Tr. page 79*)

#### **ATTENDANCE AT PERKINS FOR 1999-2000 SCHOOL YEAR**

47. On September 1999 the Student returned to Perkins for the new school year. (*Testimony of P. Wolfram, Tr. page 77*) Perkins submitted a progress reports in January and April, 2000. (*Parents Ex. Vol. IV, pages 177-202, Progress Report*) (Progress Reports are added each time to previous reports so end of year report shows several previous reports).
48. Student overcame multiple medical issues during this school year, including diagnosis of a mandibular cyst, as reported in the Health Services Nursing Summary. (*Parents Ex. Vol. IV, pages 257-258, Health Services Nursing Summary*)
49. Student's behavioral treatment report verified the correlation between behaviors and medical issues. Student's behaviors were identified as of three types, silly (due to overstimulation), avoidant (to avoid doing nonpreferred task) and frantic (related to medical issues) (*Parents Ex. Vol. IV, pages 253-256, Behavioral Treatment Report*)
50. In the April annual review, present levels of performance noted progress in improved daily living skills routines (picks up her bedroom and does cottage chores w/prompts, completes her laundry w/ adaptive device for sorting); increased expressive vocabulary, understanding of work vs. play concepts, able to stay on task in busy environment, improved mobility skills (waits for directions at street crossings, follows sidewalk, excellent orientation and memory skills), improved signing skills (commenting on environment, increased expressive vocabulary and uses new vocabulary, identified facts through calendar and meeting) makes predictions based on past experience; understands and associates parts of days with activities, sorts by shape and color, uses tools in cooking, horticulture and vocational areas, uses utensils w/ reminders, uses adaptive tools



for food preparation, improvement in following directions. (*Parents Ex. Vol. IV, pages 214-220, IEP*)

51. In April-May 2000, Student's IEP goals and objectives were revised with input from the District. (*Parents Ex. Vol. IV, page 224-248, IEP Goals & Objectives; Testimony of Phyllis Wolfram, Tr. 81*)
52. Perkins completed the Student's IEP on May 1, 2000.

#### **PLACEMENT OPTIONS FOR THE 2000-2001 SCHOOL YEAR**

53. During the 1999-00 school year, the following events occurred concerning the possible placement/referral of the Student to MSB, MSD or Perkins:
  - A. On October 29, 1999, the District filed an Extraordinary Cost Fund Application with DESE for school year 1998-99. (*Exh. 34*)
  - B. On December 16, 1999, William R. Daly, Director of Grants and Application Processing for DESE wrote a letter to George Wilson. (*Exh. 35*)
  - C. On April 18, 2000, William Daly wrote a letter to Dr. Jack Ernst. (*Exh. 36*)
  - D. On April 18, 2000, a telephone conference was held between Dr. Stephen Barr, Heidi Atkins Lieberman, Rick Hutcherson, George Wilson and Phyllis Wolfram to discuss options for placement of the Student and the "Katie Beckett" waiver. (*Exh. D-40; Testimony of G. Wilson, Tr. pages 335-338*)
  - E. On April 19, 2000, Phyllis Wolfram wrote a letter to Melodie Friedebach enclosing the Student's educational records and requesting information from DESE. (*Exh. 3*)
  - F. On April 24, 2000, a telephone conference was held between Rose Spychalski of the Regional Center and Phyllis Wolfram regarding the Student. (*Exh. D-42; Testimony of P. Wolfram, Tr. page 82*)
  - G. On April 25, 2000, Rick Hutcherson, DESE wrote a letter to George Wilson requesting information regarding the Student. (*Exh. 4*) Following receipt of Mr. Hutcherson's letter dated April 25, 2000, (*Exh. 4*) George Wilson had a telephone conversation with Heidi Atkins Lieberman regarding the letter from Rick Hutcherson. During this conversation Ms. Lieberman told Mr. Wilson that the District should not respond to Mr. Hutcherson's letter dated April 25, 2000. (*Exh. 4*)
  - H. On May 5, 2000, a letter was sent by Phyllis Wolfram to the Parents with Notice



of Conference for the June 2, 2000 IEP meeting. (*Exh. D-44; Testimony of P. Wolfram, Tr. pages 84-85*)

I. On May 15, 2000, a meeting was held at DESE in Jefferson City between Dr. Stephen Barr, Melodie Friedebach, Heidi Atkins Lieberman, George Wilson and Phyllis Wolfram concerning the Student. During the meeting:

1) Mr. Wilson and Ms. Wolfram expressed their concern that MSB had refused to accept the Student in July 1998. Dr. Barr and Ms. Lieberman acknowledged that MSB's refusal to accept the Student when she was initially referred by the District in 1998 was not appropriate. Dr. Barr and Ms. Lieberman assured Mr. Wilson and Ms. Wolfram that they would make a determination by June 2, 2000 as to whether MSB would accept the Student.

2) Mr. Wilson and Ms. Wolfram stated that the District was concerned that its cost for the Student's 1998-99 placement and the projected cost for her 1999-00 placement far exceeded the costs that DESE had projected and indicated that the current level of state support for the Student's placement was inappropriate. Mr. Wilson and Ms. Wolfram inquired as to whether DESE would provide additional support for the Student. Dr. Barr and Ms. Lieberman stated that DESE could not provide additional funding to increase DESE's cost share for the Student's expenses at Perkins.

3) Dr. Barr and Ms. Lieberman indicated that DESE would explore the feasibility of changing the Extraordinary Cost Fund reimbursement calculation in a way that would additionally protect districts from costs exceeding one hundred thousand dollars. (*Exh. D-45; Testimony of G. Wilson, Tr. pages 340-345*) Mr. Wilson testified as following regarding this conversation:

"...we had confronted . . . Dr. Barr and Heidi Atkins Lieberman with the information regarding the initial refusal in 1998. We stated a case that we had subsequent to that time suffered unfairly from a financial perspective. There was no argument from them on that issue.

When I say laughing at MSB's refusal letter as well as the follow-up letter, I don't mean to imply they were rolling on the floor, but there was some — chuckling might be a better descriptor than laughing.

They also indicated that MSB in their view would have no way to defend refusing a referral if one were made at that time. And we asked for specific assurance. We had a June 2<sup>nd</sup> IEP meeting set up with [the parents], and they assured us that they would respond to



the two questions listed under No. 2 on that page prior to June 2<sup>nd</sup>, specifically would MSB accept her and, if they do, would MSB support that decision in a later due process hearing.

They stated they would not, in response to our specific request, they indicated they could not provide any additional funding to increase their cost share for [the Student's] expenses at Perkins."

(*Testimony of G. Wilson, Tr. page 344, lns. 23 - 25; Tr. page 345, lns. 1-20*) On May 24, 2000, Mr. Wilson confirmed this meeting in his letter to Dr. Stephen Barr. (*Exh. 6*)

J. On May 18, 2000 an E-Mail message was sent to the Special Education Group from Maggie Vieth regarding use of the Extraordinary Cost Fund. (*Exh. 5*) The nature of the proposed change to the Extraordinary Cost Fund was "that the State would, assuming the availability of funds, would give first priority to districts under the Extraordinary Cost Fund whose costs were exceeding \$100,000." (*Testimony of S. Barr, Exh. D-85, page 33, lns. 15-19*)

K. On May 25, 2000, Dr. Stephen Barr wrote a letter to George Wilson. (*Exh. 7*)

L. On May 30, 2000, a meeting took place between Dr. Stephen Barr and Dr. Yvonne Howze at MSB which concerned the Student. (*Testimony of Y. Howze, Exh. D-88, pages 50-51*) Dr. Howze testified that in her conversation with Dr. Barr regarding the Student she said the following:

1) "What I recall is Dr. Barr asking me to take a look at the letter (*Exh 8*) and determine whether . . .there was a possibility that we could provide services here for [the Student] based on what we were saying we needed at that time. . . I looked at it, and he and I talked about it, and basically just said the same thing that I have consistently said, is that it would require additional staff around the clock for communication purposes, we don't have any peers here for her to interact with . . .And we talked about appropriateness versus least restrictive environment..." (*Testimony of Y. Howze, Exh. D-88, page 44, lns. 10-25; page 45, lns. 1-3*)

2) that she did not believe that MSB was an appropriate placement for the Student. (*Testimony of Y. Howze, Exh. D-88, p. 47, lns. 8 - 12; page 59, lns. 6-11*)

3) that even if MSB wanted to provide a program for the Student the "people trained in deaf/blindness [were] very hard to find." (*Testimony of Y. Howze, Exh. D-88, page 49, lns. 9-21*)

M. On June 1, 2000, a telephone conference was held between Dr. Stephen Barr, Dr. Jack Ernst, Dr. Janice Duncan, George Wilson and Phyllis Wolfram regarding the



Student's eligibility to attend MSB. Phyllis Wolfram testified as follows concerning the conversation:

"Dr. Barr . . . indicated . . . that he would need to have a conversation with Yvonne, that we needed to review the IEP with the MSB staff, that he [did] not see that it would be a problem, that they would need to hire signing staff to work with [the Student]. The next question . . . was will she continue to be eligible for the extraordinary cost fund, and that would be if she remained at Perkins, as we would be discussing these placement options at the IEP meeting, and Dr. Barr indicated that he would need to reflect on this. I think the statement was made that she would be eligible if stay-put applied. . . ." (*Testimony of P. Wolfram, Tr. page 87, lns. 9-21; Exh. D-46*)

N. On June 1, 2000, Dr. Stephen Barr had a telephone conference with Tom Culliton at MSB. During the conversation Dr. Barr informed Mr. Culliton that MSB would receive "information on [the Student]." (*Testimony of T. Culliton, Exh. D-86, pages 50-51*)

O. On June 1, 2000, George Wilson sent a facsimile to Tom Culliton with the Student's current IEP. (*Exh. 24*) Thereafter that same day, a telephone conversation took place between Tom Culliton, Dr. Betty Davidson, Linda Van Eck, George Wilson, Dr. Janice Duncan and Phyllis Wolfram. Testimony concerning this conversation was elicited from several witnesses. The following occurred during this conversation:

1) Tom Culliton testified that the parties discussed the difference between the staff MSB had in place and the staff that would be needed to provide an appropriate program for the Student. It was Mr. Culliton's understanding from Mr. Wilson that Dr. Barr was willing to provide funding for the necessary staff. Mr. Culliton also recalled that there was a discussion concerning the lack of signing peers at MSB and that there were no students coming into the MSB program that were deaf-blind. (*Testimony of T. Culliton, Exh. D-86, pages 54-56*) Mr. Culliton further testified that on June 1, 2000 he felt that Perkins was the appropriate placement for the Student. (*Testimony of T. Culliton, Exh. D-86, pages 75-76*)

2) Following the conversation, on June 2, 2000 George Wilson sent a letter to Tom Culliton which confirmed the June 1, 2000 telephone conversation. (*Exhs. 10 and 27; Testimony of P. Wolfram, Tr. pages 88-89; Testimony of G. Wilson, Tr. pages 350-353*) The letter states in pertinent part:

"In accordance with our understanding from Dr. Barr, we faxed a



copy of an IEP to you earlier on June 1, and then called you that afternoon to discuss the IEP and to determine how it may be implemented at MSB. In response to our questions about the IEP, you indicated that they were not relevant since, when any student enrolls at Missouri School for the Blind (MSB), a 30-day on-site assessment is conducted and then MSB writes a new IEP. After further questioning, you indicated that your lack of signing staff and signing peers would prevent you from being able to implement the IEP. In fact, you also indicated that MSB would be an inappropriate placement option for any deaf-blind student who communicated with signs and that you currently had only one deaf-blind student enrolled in your program (one who has no sign or verbal language).

You also explained the referral process at MSB and informed us that, to your knowledge, the student was not eligible to begin attendance at MSB in the fall of 2000. Despite our explanation that Dr. Barr had indicated that additional needed resources would be provided to accommodate this student's needs, you further stated that MSB would not be an appropriate placement for the student. In response to our inquiry, you stated that you thought that Perkins School for the Blind was the appropriate placement for the student.

When we questioned that position in light of the September 14, 1998 letter from Dr. Howze (which DESE staff had interpreted as a letter of acceptance), you clarified that you were involved in that decision and that the September 14, letter was by no means an acceptance letter – that MSB had never agreed to allow this deaf-blind student ... attend MSB. . . .”

P. On June 1, 2000, Tom Culliton sent a memorandum to Dr. Yvonne Howze concerning the Student. (*Exh. 25; Testimony of T. Culliton, Exh D-86, page 53*) The memorandum states:

“Dr. Barr had Mr. Wilson fax this IEP to us. Wanted us to review then let Springfield know what we could not implement when [the Student] was a student at MSB – Yes, they Springfield are going to recommend [the Student] to MSB at the IEP tomorrow, Friday, June 2, 9:30 a.m. We told them we do not write IEP's for other School Districts. We also told them . . . we do an assessment, with parent's permission, within the first 30 days so we know the child's needs thus will be able to write an IEP to meet the student's needs.



I do not know why we are in this mix because both Mr. Wilson and Dr. Barr said parents will file for a due process meeting which would drag out 2 - 3 yrs . . .”

This memorandum was attached to the materials Mr. Wilson had faxed to Mr. Culliton earlier that day concerning the Student. (*Exh. 24; Testimony of T. Culliton, Exh. D-86, page 53, lns. 10-13*)

Q. On June 2, 2000, a telephone conference was held between Dr. Stephen Barr, Heidi Atkins Lieberman, Dr. Jack Ernst, Dr. Janice Duncan, George Wilson, Phyllis Wolfram and Ransom Ellis, III concerning the Student. George Wilson testified that the “main issue” the District was interested in was whether or not MSB was a placement option that the District could consider in the IEP meeting that morning. (*Testimony of G. Wilson, Tr. page 354*) Mr. Wilson testified as follows:

“We had been told yes it was by the state department officials, and the staff at MSB said no, she is not, and so we went back to Dr. Barr on the morning of June 2<sup>nd</sup> to try and resolve that question, is she or is she not.”

(*Testimony of G. Wilson, Tr. pages 354, lns. 17-25*) The following occurred during this conversation:

- 1) Mr. Wilson stated that he had spoken with the MSB staff concerning the Student’s possible eligibility to attend MSB in the fall. Mr. Wilson indicated that he was told that the Student was not eligible to attend MSB. Mr. Wilson further stated that the MSB staff told him that based upon their knowledge of the Student they would not recommend the MSB deaf-blind program for this student, or for any other deaf-blind student who utilized signs to communicate. (*Exh 11*)
- 2) Mr. Wilson stated that Tom Culliton had stated that he was a part of the team that reviewed this student’s application in 1998, and that Dr. Howze’s September 14, 1998 letter was not an acceptance letter – that MSB had never agreed to serve the student at MSB. (*Exh. 11*)
- 3) Mr. Wilson stated that the MSB staff recommended placement of the Student at Perkins. (*Exh. 11*)
- 4) Dr. Barr stated that MSB was an appropriate placement option for the student, and that the student was eligible to attend MSB starting in the fall semester of the 2000-2001 school year, (*Exh 11; Testimony of Dr. Stephen Barr, Exh. D-85, page 49, lns. 2-8; Testimony of P. Wolfram, Tr. page 91*) which “constitute[d] an acceptance of [the Student] at MSB.” (*Testimony of S. Barr,*



*Exh. D-85, page 49, lns. 9-11*) George Wilson testified as follows concerning the conversation:

“ . . . we relayed the information that we had gotten . . . out of our conversation with the MSB staff to Dr. Barr and to Heidi Atkins Lieberman, and they responded to us that . . . [the Student] was accepted to attend there beginning the fall term of this current school year.” (*Testimony of G. Wilson, Tr. page 355, lns. 3-9*)

R. On June 2, 2000, an IEP meeting was held with the Parents, Sharon Streett, George Wilson, Phyllis Wolfram and Ransom Ellis, III and the Student’s IEP was completed generally following the IEP developed earlier by Perkins. (*Exh. D-47; Testimony of P. Wolfram, Tr. pages 92-94*) However, the District revised Student’s IEP to provide that access to psychiatric consultation and medical services be characterized as “school health services,” because MSB does not provide access to psychiatric consultation and medical services on a 24 hour basis as does Perkins. (*Parents Ex. Vol. IV, page 361*) The new IEP also documented consideration of Braille instruction and concluded that it was not appropriate. Parents were also to explore transition options (*Exh. D-47*) During this meeting, the District advised the Parents that the District recommended placement at MSB for the 2000-2001 school year.

S. On June 2, 2000, George Wilson sent a letter to Dr. Stephen Barr confirming the telephone conference held on June 2, 2000. (*Exh. 11*) The letter to Dr. Barr states in pertinent part:

“You indicated that Dr. Howze was in Argentina, so you were unable to contact her. I reported the substance of my 6-1-00 telephone conversation conference with MSB staff that included:

- 1) The student was not eligible to attend MSB in the fall.
- 2) Based upon their knowledge of the student they would not recommend the MSB deaf-blind program for this student (or for any other deaf-blind student who utilized signs to communicate).
- 3) They recommended the Perkins School for the Blind as the appropriate placement for the student

Mr. Culliton also stated that he was a part of the team that reviewed this student’s application in 1998, and that Dr. Howze’s September 14, 1998 letter was not an acceptance letter – that MSB had never agreed to serve the student at MSB. Since we were minutes away from our scheduled IEP meeting with



the parents and their attorney, we requested clarification of her MSB eligibility status. You responded that MSB was an appropriate placement option for the student, and that the student was eligible to attend MSB starting in the fall semester of the 2000-2001 school year. . .”

T. On June 5, 2000, a telephone conference was held between Dr. Stephen Barr and George Wilson. During this conversation Dr. Barr indicated that he had spoken with Dr. Yvonne Howze “and that she had assured [him] that [the Student] could be appropriately served at MSB,” and he had assured her that “the necessary resources would be there.” (*Testimony of S. Barr, Exh. D-85, page 55, lns. 23-25; page 56, lns 1-14; Exh. D-48*)

U. On June 14, 2000, a telephone conference was held between Dr. Stephen Barr and George Wilson. (*Exh. D-49*)

V. On June 28, 2000, a telephone conference was held between Dr. Stephen Barr, Heidi Atkins Lieberman and George Wilson regarding the Student.

W. On June 28, 2000, George Wilson wrote a letter to the Parents (*Exh D-51*) enclosing a Notice of Action form which described the action to be taken as follows:

“The District proposed changing [the Student’s] school assignment from the Perkins School for the Deaf [sic] (her current assignment) to the Missouri School for the Blind at the 6-2-00 IEP meeting. You objected to this change and requested [the Student] remain at Perkins. The District refused this request.”

The letter which transmitted this Notice of Action form states in pertinent part as follows:

“Please note that our recommendation to change her assignment to MSB is based primarily upon assurances from our state department that MSB could appropriately meet her needs. However, that school is not currently able to meet her needs and will require 30 days advanced notice in order to obtain additional needed staff and resources to do so.

Should you decide to pursue due process and invoke ‘stay put’, the additional needed resources at MSB will not be pursued until a later date. If, however, you intend to enroll her for the fall 2000 term, MSB will need to be informed within the next 30 days.”

54. On June 30, 2000 the parents filed their Fourth Due Process Request. (*Exh. D-52; Testimony of G. Wilson, Tr. page 363*)



55. On and after July 1, 2000, during school year 2000-01, District personnel communicated with personnel from Perkins concerning the Student. The following communications occurred:
- A. In July 2000, the Student's Progress Report was received from Perkins. (*Exh. D-53; Testimony of P. Wolfram, Tr. page 95*)
- B. In December 2000, the Student's Progress Report was received from Perkins. (*Exh. D-55; Testimony of P. Wolfram, Tr. page 95*)
56. On July 6, 2000, Dr. Yvonne Howze had a conversation with Dr. Stephen Barr concerning the Student. During the conversation, Dr. Howze and Dr. Barr:
- A. "went back through the whole issue of least restrictive environment," and Dr. Howze indicated that "it's not appropriate to place [the Student] here because we don't have peers that are her chronological age." (*Testimony of Y. Howze, Exh. D-88, page 70, lns. 15-20*)
- B. that "to have a good successful . . . fully rounded comprehensive program for this child we did not need to have her in isolation at MSB where we have kids who are blind and don't sign." (*Testimony of Y. Howze, Exh. D-88, page 70, lns. 20-25*)
57. While the Student has been enrolled in the residential program at Perkins, IEPs have been prepared for her. Mary Zatta testified that she has been involved in the preparation of the Student's IEPs. Other participants have been the Parents, at least one special education teacher who has taught the Student and representatives of the District. (*Testimony of M. Zatta, Tr. 794, lns. 7-25; lns. 1-3*)
58. During the time the Student has been enrolled in the residential program at Perkins, the IEPs which were prepared for her met the standards set forth in the Missouri State Plan and the IDEA. (*Testimony of M. Zatta, Tr. 795, lns. 4-15*) The special education and related services provided at Perkins, were provided in conformity with the IEPs that were prepared for the Student. (*Testimony of M. Zatta, Tr. 795, lns. 16-19*) The costs of the Student's program have been borne by the District or DESE. (*Testimony of M. Zatta, Tr. 795, lns. 8-12*)

## **STUDENT'S EDUCATIONAL NEEDS**



59. Many of Student's educational needs have been identified by a series of deafblind consultants and educators since 1989. The following areas of need have been consistently determined:

A. Communication Needs

1. The Need for a Multi Sensory or Deafblind Program

Since her kindergarten year, deafblind consultants and educators have identified the need for Student to be served in a program designed for multi sensory impaired or deaf blind children. (*See Parents Ex. Vol. I, page 490, 1994 MacFarland Report; Parents Ex. Vol. II, pages 209-248, 1996 Perkins Evaluation*)

2. Use of Total Communication<sup>5</sup>

- a. The deafblind consultants and educators who have worked with Student or consulted with her school district have consistently identified the use of total communication across environments as necessary for Student to learn language and communication. (*Parents Ex. Vol. I, pages 3-6 Visually Impairment Preschool IEP, Parents Ex. Vol. I, page 20, page 27, page 42, 1989, Perkins Evaluation; Vol. I, page 146, Van Eck Niedringhaus Report; Vol I, page 286, 1993 Van Eck Niedringhaus Report; Vol. II, page 39, 1995 MacFarland Report*)
- b. The use of sign paired with verbalizations and sign paired with other visual modes such as pictures, with activities, photographs and words were identified as the way Student was able to learn. (*Parents Ex. Vol. I, page 27 1989 Perkins Evaluation; Parents Ex. Vol. I, page 146, Van Eck Niedringhaus Report*)

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<sup>5</sup> **Total communication** means using every method available and meaningful to the student to communicate, including pictures, objects and any other modes that are useful. For Student currently, total communication is sign language, gestures, written words, pictures, both receptively and expressively. (*Tr. page 745, lines 7-16, Zatta*)

**Total communication environment** is an environment in which everywhere the Student goes, and every staff person she goes to, her total communication methods are used, and her fellow students have a communication mode in common, even though they may have an individual sets of modes. For Student, the shared mode is signing. (*Tr. page 745, line 16 through page 746, line 25, Zatta*)



- c. Perkins has specifically identified that the total communication method provided in a total communication environment is necessary for Student to make educational progress. (*Tr. page 745, line 7 through page 746, line 2*)
- B. Need For Functional Academics
 

The deafblind consultants and educators who have worked with Student and consulted regarding her education have determined that Student needs functional academic curricula. (*See Parents Ex. Vol. II, page 41, 1995 MacFarland Report*)
- C. Socialization Needs
  1. The deafblind consultants and educators who have worked with Student and consulted regarding her education have identified her need for socialization as a primary need. Her socialization skills are one of the core learning areas severely affected by her deafblindness. (*Parents Ex. Vol. I, pages 27, 38, & 41 1989 Perkins Evaluation. Parents Ex. Vol. I, pages 488-489, MacFarland Report, Parents Ex. Vol. II, page 41, MacFarland Report*) (need for cooperative group work, partner work, peer interaction is a priority); (*Vol. II, page 41, MacFarland Report*) (Student needs more opportunities for peer interaction).
  2. The deafblind consultants and educators who have worked with Student and consulted regarding her education have identified her need for direct communication with peers in order to learn appropriate socialization and communication. (*Parents Ex. Vol. I, page 20 through page 27, 1989 Perkins Evaluation*) (*Student's peer group should include children who have the same input system.*); (*Parents Ex. Vol. I, page 147, Van Eck Niedringhaus Report*) (*Social partners are required for communication to occur. Rapport, relationships, friendships with peers, adults and family are critical.*) (*Parents Ex. Vol. II, page 4, McCarthy Report*) (*Needs - Increased social opportunities and experiences*) (*Parents Ex. Vol. II, page 41, 1995 MacFarland Report*) (*Student needs to know she can communicate with peers and they can communicate with her.*); (*Parents Ex. Vol. II, pages 313-314, 1996 Susan Bruce Marks Report*)
6. Behavioral Expertise Intervention Needs
 

In 1996 Perkins found that Student needed intensive behavioral therapy with consistency across environments, (*Parents Ex. Vol. I, page 9, 1996 Perkins Evaluation; Parents Ex. Vol. II, pages 307, 313-314, 1996 Susan Bruce Marks Report*)



60. In addition to the needs that have been identified over the years, Perkins has identified additional needs during the last three years:
- A. Close monitoring of health conditions by nursing and medical staff familiar with deafblind children with CHARGE Syndrome
  - B. Close coordination between all educational staff, medical and behavioral staff.
  - C. Frequent on site observations and consultations with behavioral psychologist experienced in working with deafblind children with CHARGE
  - D. Frequent access to psychiatrist familiar with deafblind children with CHARGE
  - E. Use of total communication set that does not rely on any auditory input ( since Student's total deafness)

#### **STUDENT'S 2000 - 2001 IEP**

61. The District and the Parents agreed upon Student's 2000-2001 IEP with the exception of the placement and the description of health services provision discussed earlier.
62. Review of Student's IEP indicates some requirements of any placement option:
- A. Instructional services during all waking hours ( 24 hour IEP). Student's IEP has goals and objectives in the social/emotional, language/ communication, behavioral, daily living skills, and leisure/recreational skills, that require implementation during all waking hours. (*Parents Ex. Vol. IV, page 389, 2000-2001 IEP*)
  - B. Residential supervised group living setting for implementing residential goals and objectives. (*Vol. IV, pages 379, 381, 382 & 384. 2000-2001 IEP*) Student's daily living skills goals and objectives are designed to enable her to live in a supervised group living setting, and natural environments are required for skill acquisition. Cooperatively performing housekeeping chores, doing laundry, making grocery lists, buying groceries, cooking meals, cleaning up and sharing leisure areas and activities are required to implement her daily living goals and objectives.
  - C. A total communication environment in which all staff and students, with whom she is grouped, use total communication twenty-four hours a day to allow students to directly communicate with others whom she shares sign as a primary mode of communication. (*Parents Ex. Vol. VI, pages 356-366, 2000-2001 IEP; Parents Ex. Vol. I, pages 371, 380, 384 & 385*)



- D. Vocational settings appropriate for Student's deafblindness. (*Parents Ex. Vol. I, page 383, 2000-2001 IEP*)
- E. Structural behavioral intervention with attention to consistency across all environments. (*Parents Ex. Vol. I, page 9, 1996 Perkins Evaluation, Parents Ex. Vol. II, pages 307, 313-314, 1996 Susan Bruce Marks Report*)
- F. Consistent health status monitoring.

### **STUDENT'S EXPERIENCE AT PERKINS**

63. Student's placement at Perkins can be described as follows:
- (a) Mary Zatta, Assistant Supervisor of the Deaf Blind program at Perkins School for the Blind is in charge of Student's program at Perkins. (*Tr. page 736, 19-20, Zatta*)
  - (b) Zatta has a Master's Degree from Northeastern University in severe special needs and is certified in severe and moderate special needs. She also has a Master's Degree in Educational Administration from the University of Boston, Massachusetts and is certified as a special education administrator. She is currently working on her Doctorate in Educational Administration. (*Tr. page 737, lines 2-12, Zatta*)
  - (c). Zatta has consulted for years with the Adult service system serving deafblind adults residentially and in work and day programs. (*Tr. page 737, lines 15-18, Zatta*)
  - (d). Zatta has been employed at Perkins since 1981 in various positions as residential aide, teacher, and administrator in the deafblind program. (*Tr. page 737, line 21, Zatta*)
  - (e). Zatta has a case load of thirty students and sees Student everyday. (*Tr. page 738, lines 16-20, Zatta*)
  - (f). In her classroom Student is placed with five students, two teachers and three aides, all of whom share her primary mode of communication -- signing. (*Tr. page 746, lines 5-25, Zatta*)
  - (g). In the cottage she lives with seven other students in a group living situation. Two program aides work with Student and two other students in the cottage. The group also has assistant house parents and a supervisor in the cottage. All staff and students share signing, as a primary mode of communication. (*Tr. 753, lines 1-55, page 754, lines 8-24, Zatta*)



- (h). Student is also served by a behavior specialist, Laurie Denno, medical physician staff support, mobility teacher, speech and language therapist, vocational teachers, adaptive P.E. teacher, an administrator and a psychiatrist. All of these staff are deafblind trained and use total communication in working with Student. *(Tr. page 753 lines 9-24, Zatta)*
- (i). Student begins her day with a class meeting where she and her classmates meet and talk about their day and their activities. This time is for building communication and social skills. *(Tr. page 755, lines 19-25)* Social skills have to be taught to Student through incidental learning with her peers with whom she can directly communicate. *(Tr. page 756, lines 4-25, Zatta)*
- (j). Student has other classroom time where she works on academic skills, a substantial number of vocational activities, swimming, gym, mobility, speech and cooking. *(Tr. page 758, lines 13-16, Zatta)*
- (k). In the cottage, Student's program focuses on reinforcing communication and language development, developing leisure and social skills and independent daily living skills in the group setting. *(Tr. page 758, line 24, through page 759, line 5, Zatta)*
- (l). Mary Zatta, Director of the Deaf Blind program, meets weekly with the behavioral psychologist about Student and a larger team meets bi-weekly consisting of classroom and residential staff, Zatta and the behavioral psychologist. The larger team meets once a month with the psychiatrist. *(Tr. 762, lines 2-21, Zatta)*
- (m). The team meetings are necessary to serve Student because of the huge amount of work involved in understanding what is going on with Student. *(Tr. page 763, line 20, through page 764, line 7, Zatta)*
- (n). At Perkins, Student requires experienced staff because of her complexity and numerous staff because of the stamina required to work with her during long periods of upset. *(Tr. page 766, line 12, through page 767, line 14, Zatta)*
- (o). The biggest hurdles in educating Student have been medical issues and her behavior which are related. Student has significant recurring ear infections that are not easily diagnosed, and anxiety disorder, OCD that fluctuates. In the beginning she has aggressive behaviors but these are minor at this point. *(Tr. page 759, line 22, through page 760, line 5, Zatta)*
- (p). When Student first went to Perkins she did not communicate with peers, and has only begun to interact with peers within the last year. *(Tr. page 806, line 20, through page 807, line 4, Zatta)*



- (q). Student cannot learn social skills without access to peers who share her mode of communication. *(Tr. page 791, lines 21-24, Zatta)*<sup>6</sup>
- (r). Given her age and behavioral problems, Student cannot make educational progress in the areas of acquisition of language and appropriate social skills without access to peers who sign because she would have no way to practice. *(Tr. page 805, lines 7-15, Zatta)*
- (s). Student is one of the program's more challenging students, medically and behaviorally, who requires very intensive efforts on the staff's part, more so than most students. *(Tr. page 767, lines 15-21)*
- (t). Long term, Student can be expected to live in a small group living situation and have a day program that allows her some part time work with supports, in the community. She should be able to have a part time job and then do things like cooking, and go into the community for recreational purposes, like swimming, health club. *(Tr. page 759, lines 6-21, Zatta)*
- (u). Laurie Denno is Student's behavioral specialist at Perkins. Denno has a degree in psychology from Michigan State University, and a Master's in Behavioral Psychology from Southern Illinois University. She has been active in applied behavioral analysis for twenty five years, and has worked with children since 1980. She began working with children at Perkins since 1987 and in the program with deafblind children since 1988. *(Tr. page 813, lines 2-20, Denno)*
- (v). At Perkins Denno has a caseload of 12 to 14 students, including Student, for whom she oversees all behavioral management treatment, doing observations, data collection, working with teachers and staff to design and monitor behavior treatment for children. *(Tr. page 813, line 21, through page 814, line 7, Denno)*
- (w). Student came to Perkins with very complicated behavior, a lot of self injurious behavior, aggressive behavior, and repetitive non functional behaviors. *(Tr. page 814, lines 13-18)* Student had a very strong behavior repertoire. *(Tr. page 815, lines 22-23)* When she first came she was engaging in aggressive behavior on

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<sup>6</sup>Mary Zatta described access to peers as "what its all about" referencing the importance of peers to making educational progress. *(Tr. page 791, lines 15-17, Zatta)* Zatta does not believe that Student can make educational progress in a hearing environment even with signing as a support. *(Tr. page 803, line 21, through page 804, line 1)*



average of three and a half times a week but there would be days when she would have aggressive behavior at a frequency of 10 or 20 times. There has been a huge decrease in those behaviors, one of her biggest successes. *(Tr. page 814, line 13, through page 816, line 11, Denno)*

- (x). Student uses time out for two purposes, one for decreasing attention which is reinforcing for the student around the undesirable behavior, and one for reducing overstimulation.
- (y). Student's behaviors have been sorted into three types: "silly" or aggressive behavior; "avoidant" behavior; and "frantic" behavior, which is very intense and self injurious behavior. *(Tr. page 818, line 13, through page 819, line 18, Denno)*
- (z). Student's "frantic" behavior is associated with her medical condition. *(Tr. page 820, lines 17-22, Denno)*
- (aa). Student's "frantic" behaviors are related to constipation, ear infections, very dry skin, colds, and blisters; but the ear infections are primary. *(Tr. 821, pages 4-11, Denno)*
- (bb). Student is also diagnosed with an anxiety disorder, obsessive compulsive disorder. Many children with CHARGE have anxiety disorders. Student is medicated for her anxiety disorder. *(Tr. page 821, lines 18-21, Denno)*
- (cc). Student also has significant mood swings, another characteristic of children with CHARGE, for which she is medicated with a mood stabilizer. *(Tr. page 823, lines 11-21, Denno)*
- (dd). Denno, the behavioral consultant, spends a lot of time in Student's classroom. During the first two years Student was at Perkins, Denno ate lunch with Student's class every Wednesday, and she has had many individual cottage staff trainings about Student and her protocol. *(Tr. page 823, line 25, through page 824, line 15, Denno)*
- (ee). Student is one of the most difficult students with which the behavioral consultant has ever worked, as she is exceedingly complicated, very challenging, very difficult. *(Tr. page 826, lines 6 -18, Denno)*
- (ff). The teaching of social interactions with peers is one of the most important things to Student's future. *(Tr. page 827, line 20, through page 828, line 1, Denno)*<sup>7</sup>

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<sup>7</sup> "It's crucial that she be able to interact with other students and her peers; otherwise she will have an isolated life. She won't be able to function as an adult." *(Tr. page 827, line 20, through page 828, line 1, Denno)*



- (gg). Learning appropriate social skills is critical to Student's future ability to live or work with others. *(Tr. page 828, line 22, through page 829 line 7, Denno)*<sup>8</sup>
- (hh). At Perkins Student will have access to a medical expert on CHARGE. *(page 843, line 5-12, Denno)*
- (ii). Perkins has the largest concentration of CHARGE students in one place, and Perkins behavioral specialist and psychiatrist are conducting studies related to their behavioral and learning needs.
- (jj). Student's placement at Perkins does not prevent her Parents from fully participating in her life or education. *(Tr. page 808, line 13 through page 809, line 5, Zatta; Tr. page 833, lines 7-13, Denno)*

### **MSB AS A PLACEMENT OPTION FOR STUDENT**

- 64. The Missouri School for the Blind has in the past, served a number of deafblind children. *(Davidson Depo. page 30, lines 16-18)*
- 65. Deafblind children placed at MSB have been served in the Multiple Handicapped/Deaf Blind program. *(Davidson Depo. page 30, lines 16-19)*
- 66. The children in the multiple handicapped program are those generally considered to be profoundly handicapped and function at a level of less than three years. *(Davidson Depo. page 30, lines 8-9)*

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<sup>8</sup> "It's the most important thing. I think that social skills are always the things that make people fail in adult services, not whether they can recycle the cans, or take a shower, but whether they can get along with their peers at home, whether they are causing other people difficulties, whether they can say hello to the guy at the recycle place." *(Tr. page 828, line 22, through page 829 line 7, Denno)*



67. When Student was considered by MSB for referral in 1998, one of the reasons she was rejected was that she did not fit in the multiple handicapped program given that she functioned on a higher level than the children in that program. (*Davidson Depo. page 29 line 20 through page 30 line 5*)<sup>9</sup>
68. Perkins estimates Student's cognitive impairment to be somewhere in the moderate range. (*Tr. page 797, lines 17-19*)
69. The District chose MSB as Student's educational placement because they considered Student to be a severely handicapped student and felt DESE had an obligation to assist school districts with educating children with severe handicaps, and Dr. Barr had assured them appropriate staff would be in place in order to provide Student those appropriate educational services. (*Tr. page 172, lines 23 through page 173, line 1, Wolfram*)
70. DESE agreed that MSB would be Student's educational placement because: a) Barr felt the parents and the District could not reach a reasonable agreement to educate Student in the District; (*Tr. page 584, lines 12-15*) b) there was apparently some kind of need for the DESE to have expertise beyond consultants; (*Tr. page 584, lines 19-22*) c) MSB used to have a program for deafblind children; (*Tr. page 585, lines 2-3*) d) if DESE is going to spend a million dollars over the next five years to educate Student they might as well spend that money to build capacity in state; (*Tr. page 585, lines 8-12*) and e) legislators will be upset at spending \$185,000 out of state. (*Tr. page 587, lines 2-5, Barr testimony*)
71. The District and DESE did not consider all aspects of LRE in its placement decision-making. Specifically, the District and DESE considered neither the potential harmful effect on Student if MSB failed in its attempt to "build" a new program nor the quality of service needs of Student, particularly the specialized expertise required to deliver appropriate services. (*Tr. page 474; lines 9-18, 494, lines 20-25, G. Wilson testimony*)
72. MSB's residential program is for students who live outside of St. Louis County, because they live too far away to commute on a daily basis, not because they need 24 hour a day program. (*Dep. page 80 line 10 through page 81, line 5*) MSB does not have 24 hour IEP's. (*Dep. page 59, lines 16-8*)

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<sup>9</sup> "She was in between. She was much higher than the multihandicapped deafblind, so to me she was vocational, which would be our K-12 program but traditionally - that's where we had the problem, Traditionally we only had a program in multihandicapped deafblind so she didn't fit in the program we had in the past." (*Davidson Depo. page 329 line 20, through page 330, line 5*)



73. No residential staff are on duty after students go to the classroom. (*Culliton Depo. page 90, lines 2-5*)
74. MSB cannot develop a program where Student would have peer interaction with individuals who would be sign language students, because they don't have those students and can't develop them. (*Culliton Depo. page 76, lines 18-25*)
75. MSB staff never determined that MSB could provide Student with an appropriate educational program, even with the addition of staff. Yvonne Howze, Superintendent of MSB, consistently maintained the position that MSB could not be made an appropriate placement for Student. (*Howze Depo. page 46, line 25 through page 47, line 12; page 71, line 23, through page 72, line 1; page 74, lines 17-20*)
76. Barr relied on Tom Culliton's judgement that MSB could develop an appropriate program for Student but Culliton never said MSB could be appropriate, Barr made that assumption.<sup>10</sup>

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<sup>10</sup> Q. Has anyone at MSB told you that MSB will be able to meet Katie's needs for the 2000-2001 school year?

A. Anyone at MSB? No.

Q. Anyone outside of MSB?

A. Dr. Barr on June 1<sup>st</sup> made the assumption that we could.

Q. In his conversation with you?

A. Yes, in his conversation with me made me believe he thought we could, yes.

Q. Did he ask you if you could?

A. I don't recall that.



77. The information provided about what would be needed at MSB to implement her IEP has been limited to general statements that the necessary staff would be hired, including one deafblind educator and an interpreter or someone who has really good signing capability, supports, and professional development and training. (*Tr. pages 503-504, Barr*)<sup>11</sup>
78. MSB will not implement the IEP with which Student would come into MSB, but would first develop their own diagnostic IEP and then within thirty days write their own IEP for her. (*Tom Culliton Depo. Page 110, line 9 through page 111, line 17, page 144, lines 14-23*)
79. Building a comprehensive deaf/blind program typically takes about 3 years. (*Tr. 810, lines 9-12, Zatta*) This particular deaf/blind student is not a good choice of a student for whom to build a new program because of her extremely challenging combination of

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<sup>11</sup> Culliton had no idea what money would be needed to put together a program for Student. (*Culliton Depo. page 77, lines 17-20*)

When Howze was asked if she had done any kind of budget, if Barr were to direct her to serve Student, she had estimated that it would take \$160,000 or more to serve Student. (*Dep. page 80, lines 9-22*)

Tom Culliton, principal of the K-12 program at MSB did not know if MSB could find staff who are trained to provide services for Student. (*Dep. 76, line 24 through page 77, line 6*) Culliton was concerned that MSB would need medical staff to meet Student's needs. (*Dep. page 77, lines 11-16*)



communication, behavioral, medical, social, academic and vocational needs. (*Tr. 809, lines 12-20, Zatta; Tr. 826, lines 6-11, Denno*)<sup>12</sup>

#### **Background Facts – Cost of Education And Extraordinary Cost Fund**

80. During school year 1998-99, the total cost of the Student's program of special education and related services at Perkins was one hundred seventy-five thousand three hundred sixty-three dollars and seventy-seven cents (\$175,363.77). The Extraordinary Cost Fund ("ECF") reimbursed the District one hundred six thousand two hundred sixty-seven dollars and sixty-nine cents (\$106,267.69) leaving unreimbursed costs of sixty-nine thousand ninety-six dollars and eight cents (\$69,096.08) for which the District was responsible.
81. During school year 1999-2000, the total cost of the Student's program of special education and related services at Perkins was one hundred seventy thousand nine hundred fifty-two dollars and sixteen cents (\$170,952.16). The Extraordinary Cost Fund ("ECF") reimbursed the District sixty-seven thousand seven hundred sixty-three dollars and two cents (\$67,763.02) leaving unreimbursed costs of eighty thousand nine hundred forty-three dollars and sixty-eight cents (\$80,943.68) for which the District was responsible.
82. The District's local tax effort for school year 1998-99 was two thousand six hundred forty-two dollars and eighty-two cents (\$2,642.82). The District's local tax effort for school year 1999-2000 was two thousand eight hundred twenty-eight dollars and nineteen cents (\$2,828.19).

### **CONCLUSIONS OF LAW**

The Hearing Panel makes the following Conclusions of Law:

1. The Individuals with Disabilities Education Act ("IDEA"), 20 U. S. C. Section 1400 *et seq.*, the IDEA Regulations, 34 C. F. R. Parts 300-301 and the *State Plan for Part B of the Individuals with Disabilities Education Act* ("State Plan") sets forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District and DESE, in providing special education and related services to students with disabilities.

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<sup>12</sup>Denno testified: "She is one of the most difficult students that I have ever worked with. She is exceedingly complicated. Not only does she have the deaf/blindness, but her CHARGE syndrome adds another dimension, her OCD adds another dimension, and she is very, very challenging and very difficult." (*Tr. 826, lines 6-11*)



2. The District is and has been, at all times relevant to this due process hearing proceeding, the local educational agency (“LEA”) responsible for providing Student with a free appropriate public education under IDEA.
3. DESE is the state educational agency (“SEA”) responsible for ensuring that Student is provided with a free appropriate public education under IDEA.
4. The Three-Member Hearing Panel was validly constituted and has jurisdiction of Student’s claims of violations of IDEA pursuant to 20 U. S. C. Section 1415 (e) (1997) and Section 162.961 RSMo 2000.
5. Student is a “child with a disability” as that term is defined in IDEA. (*Stip.* ¶2) Student is also unable to benefit from or meaningfully participate in programs in the public schools because of her disabilities. (*Stip.* ¶8)
6. The purpose of the IDEA and its regulations is: “(1) to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs; (2) to ensure that the rights of children with disabilities and their parents are protected; and (3) to assess and ensure the effectiveness of efforts to educate those children.” 34 C. F. R. Section 300.1.
7. The IDEA and Missouri law require that all students with disabilities between the ages of three and twenty-one years of age have a right to a free appropriate public education (“FAPE”). Missouri State Plan, p. 1.
8. To ensure a disabled child’s right to FAPE, IDEA mandates that an Individualized Educational Program (“IEP”) be developed for each child. Formulation of the IEP must satisfy *inter alia* the following requirements:
  - (a) The IEP team must include a public agency representative who
    - (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
    - (ii) is knowledgeable about the general curriculum; and
    - (iii) is knowledgeable about the availability of resources of the public agency.



9. The U.S. Supreme Court in *Board of Education v. Rowley*, 458 U. S. 176, 206-207 (1982) established a two-part test for determining whether a child is receiving FAPE: (a) whether IDEA procedures have been followed and (b) whether the IEP developed for the child was “reasonably calculated to enable the child to receive educational benefits.” *Id.*
10. The District and DESE did not have a representative from DESE with knowledge about Student’s specific needs and about the MSB curriculum as well as the financial resources available to MSB as a participant at the IEP meeting.<sup>13</sup> We conclude that this omission is a violation of IDEA procedures and therefore the District and DESE failed to satisfy the first part of the *Rowley* test for determining whether FAPE has been provided.
11. DESE and the District failed to comply with 34 C. F. R. Section 300.346 (b) which provides in reviewing and revising an IEP, the IEP team shall consider *inter alia* “in the case of a child who is deaf or hard of hearing . . . the child’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode ...” As noted earlier in the Findings of Fact (“FF”) #74, MSB placement would result in Student having no opportunities to communicate with peers because there are no students who use sign language currently enrolled at MSB and no evidence of a plan for providing this necessary peer interaction.
12. The Panel concludes that the current Guidelines for Referral to MSB and MSD conflict with IDEA procedural safeguards as currently enforced because re-referrals to MSB are unilateral and not appealable.<sup>14</sup> (*see AG letter 4/20/01 setting forth interpretation of Guidelines*)
13. DESE and the District also failed to meet the Least Restrictive Environment (“LRE”) requirements set forth in C. F. R. Section 300.552 (d) which mandates consideration to be “given to any harmful effect on the child or on the quality of services that he or she needs.” As detailed in FF #69-71, 74-79, the IEP team did not take into consideration the two foregoing factors.

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<sup>13</sup>Dr. Barr is identified as the IEP participant able to commit resources necessary to implement the IEP and deliver an appropriate program at MSB. (*Ex D 85, page 49*) He did not attend the IEP meeting on June 2, 2000.

<sup>14</sup>It is unclear whether the Attorney General in discussing “re-referrals” means the initial evaluation within 30 days of the student’s arrival at MSB/MSD or rather the placement decision at the end of the first school year. In either event, the lack of a right to appeal conflicts with IDEA.



14. Applying the second part of the *Rowley* test and for reasons detailed below, the Panel concludes that Student would NOT have received educational benefit from a MSB placement and therefore would be denied FAPE by such placement. Additionally, the Panel concludes that a MSB placement would in all likelihood be very detrimental to Student.
15. The Panel finds that once the District and DESE failed to carry their burden of proof that a MSB placement would result in FAPE, the Parents had the burden to show that Perkins is an appropriate placement for the Student. *Fort Zumwalt School Dist., v. Clynes*, 119 F. 3d 607 (8<sup>th</sup> Cir. 1997). As noted in FF #63 and its numerous subparts, the Parents easily met this burden and Perkins is an appropriate placement for the 2000-2001 school year.
16. Since at least the beginning of school year 1997-1998, Student has met the definition of “severely handicapped” set out in Section 162.675(3) RSMo 2000. This Section describes “severely handicapped children” as those  
“under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term ‘severely handicapped’ is not confined to a separate category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs.”
17. Sections 162.725 and 162.735 RSMo 2000 mandate that the State Board of Education will provide special educational services for all severely handicapped students, either at a state operated school or a private placement, who are not being provided such services by a local school district and who does not reside in a special school district. Student falls within the provisions of Sections 162.725 and 162.735.
18. Section 162.740 RSMo 2000 provides that a district of residence of each child attending one of the state operated schools or attending a private school under contract with DESE, “shall pay toward the cost of education of the child an amount equal to the average sum produced per child by the local tax effort of the district.”
19. IDEA regulation 34 C. F. R. Section 300.130(a) requires that the state maintain “procedures that ensure that the requirements of Sections 300.550-556 are met, including the provision in Section 300.551 requiring a continuum of placements to meet the unique needs of each child with a disability.” Subsection (b)(1) of that regulation requires any such funding mechanism be “funding neutral.” That subsection states:  
  
“(1) If the State uses a funding mechanism by which the State distributes State funds on the basis of setting where a child is served, the funding mechanism may not result in placements



that violate the requirements of paragraph (a) of this section.

For reasons to be discussed below, the Panel concludes that DESE's failure to apply the provisions of Sections 162.675-162.740 RSMo 2000 to the Student during the school years 1998-1999 and 1999-2000 clearly violated the "funding neutral" provisions of IDEA.

20. Based upon Section 162.740 RSMo 2000 and IDEA, DESE is responsible for the costs and expenses of student's placement at Perkins for the school years 1998-1999 and 1999-2000, minus the local tax effort of the District.

## **DISCUSSION**

### *Procedural violations of IDEA*

As noted earlier in Conclusions of Law # 10, DESE and the District failed to comply with 34 C. F. R. 300.344 in the development of Student's IEP on June 2, 2000 because they had no one present who could commit the resources necessary to implement the program and no one knowledgeable about the general curriculum at MSB and if MSB could meet Student's needs. Neither DESE nor MSB had a representative present. The District simply passed along to Parents and counsel assurances from Dr. Barr that DESE would provide the necessary funds to start a deaf/blind program at MSB.

The query is whether this procedural violation gives rise to a denial of FAPE. Not all procedural deficiencies result in a finding of a denial of FAPE. *See e. g., W. G. v. Bd of Trustees of Target Range School District*, 960 F. 2d 1479, 1484 (9<sup>th</sup> Cir. 1992). The standard to be met for setting aside the IEP is as follows:

if procedural deficiencies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.

*Independent School District No. 283 v. S. D. by J. D.*, 88 F. 3d 556, 562 (8<sup>th</sup> Cir.1996) (citations



omitted).

These procedural violations of DESE and the District satisfy the test set forth in the *Independent School District* decision and result in a denial of FAPE because (1) no MSB teachers or administrators were present at the June 2, 2000 IEP meeting and (2) in view of Dr. Barr's role in the MSB placement, he should have been present as the official who could commit the resources to implement the IEP at MSB. Neither the District nor the Parents could reasonably give serious consideration to MSB as a potential placement option because there was no one present with knowledge about the curriculum and how Student's IEP would be met by the MSB program.<sup>15</sup> No one from the District could describe how Student's IEP could be implemented because they had simply relied on Dr. Barr's assurance that a program would be built. Therefore, Student's Parents were impeded from meaningful participation in the development of her IEP. *See Day v. Radnor Township School District*, 19 IDELR 806 (E. D. Pa. 1993)( School district's failure to show it had evaluated the proposed private day school and analyzed its ability to implement student's IEP was a procedural violation of IDEA.)

Another area of conflict with IDEA procedures is the current State Guidelines for Referral to MSB and MSD. The Guidelines dealing with a decision by MSB or MSD to accept or reject a re-referral of Student is enforced as unilateral and not appealable.<sup>16</sup> In the context of this case, this means that if a MSB placement were found to provide an appropriate education

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<sup>15</sup>Parents have also argued that a procedural violation occurred by the failure of the District to include Perkins personnel at the IEP meeting. However, the absence of Perkins staff is not fatal because they had drafted the IEP in April and May 2000. *FF# 51*. The IEP adopted by the District on June 2, 2000 was substantially similar to the one completed by Perkins on May 1, 2000. *FF#53(R)*.

<sup>16</sup>See Attorney General letter 4/20/01 stating interpretation of Guidelines.



and Student was placed at MSB but MSB then declared that it could no longer provide an appropriate education, Student would not have the right to appeal that decision. This position is in direct conflict with C. F. R. Section 300.507(a) providing that a parent has a right to a due process hearing regarding placement decisions.

For the foregoing reasons, procedural violations of IDEA occurred with a change of placement from Perkins to MSB. The violations resulted in a denial of FAPE to the Student.

*Substantive Violations of IDEA: Failure to Deliver FAPE*

Under Missouri and Federal law, an IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U. S. at 199. Although an educational benefit must be more than *de minimis* to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455, 459 (6<sup>th</sup> Cir. 1993), *cert. denied*, 128 L. Ed 2d 664 (1994), as stated by in *Rowley*, an appropriate educational program is one which is reasonably calculated to enable the child to receive educational benefit. *Rowley*, 458 U. S. at 207. In articulating the standard for FAPE, the *Rowley* Court concluded that Congress did not impose any greater substantive standard than would be necessary to make such access meaningful. *Id.* at 192. The Court found that Congressional intent was to open the door of public education to handicapped children on appropriate terms rather than to guarantee any particular level of education once inside. *Id.*

Although states are free to adopt a higher FAPE standard than what is required by IDEA, Missouri has not done so. *See e. g., Fort Zumwalt v. Clynes*, 199 F. 3d 607, 612 (8<sup>th</sup> Cir. 1997) (The Eighth Circuit held that IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense.)



The District and DESE failed to produce evidence of any educational benefit to Student if she is placed at MSB. No one disputes that there is currently not a program in place at MSB to serve Student. In fact, the Parents have been advised that they can not place Student at MSB without giving thirty days advance notice so that MSB could begin to look for appropriate personnel. In FF #59 and 60, Student's educational needs are detailed. Further requirements for Student's placement are described in Findings of Fact #62. Neither the District nor DESE addressed any of these specialized needs of the Student with a plan for building an appropriate program at MSB during the five day due process hearing.

Not only was there no evidence of any educational benefit to the placement at MSB, there was unrefuted testimony that placement at MSB would be very detrimental to the Student.

Perkins' behavioral specialist Laurie Denno testified:

Well, I would be very concerned that she would really have a regression in her communication and behavioral skills. . . She is very complicated. I can't emphasize enough how complicated she is . . . I'm very concerned about her safety if she is, she went to a new place and people could not tell whether the behavior she is engaging in had to do with medical complications or whether she was trying to avoid the task.

I'm also very concerned that she would have a fair amount of frustration around, interacting with a whole new set of people, and I'm also very concerned – because of her emotional upset, withdrawal, possibly depression. It could be a very significant thing.

*(Tr. 830, lines 3-21)*

Denno further testified regarding her concerns if Student was placed where her peers were primarily blind and did not sign:

I think that would be a huge mistake. I think that she needs to have a peer group of students like herself so that she can communicate and learn social skills with those students. I would be somewhat



concerned for their safety as well, because she is very complicated and very difficult.

I really feel strongly that she needs to be with people who communicate in the same fashion as she does, so she can be in an environment where she sees other individuals communicating in a total communication way.

*(Tr. 830 , lines 22-25; 831, lines 1-15)*

Therefore the Panel finds that there were substantive violations of IDEA with a change of placement from Perkins to MSB. MSB is clearly not an appropriate placement for the Student.

In addition, a second substantive violation occurred when DESE and the District failed to meet the LRE requirements as set forth in 34 C. F. R. Section 300.552(d) which requires, in determining placement of a child, consideration to be “given to any harmful effect on the child or the quality of services he or she needs.” There was no testimony from Wilson or Barr, the two local and state officials most heavily involved in the MSB placement decision, that they considered any harmful effects of a change of placement for this severely handicapped child. But Perkins personnel testified as to the potential devastating repercussions for a transfer by the Student. *(Tr. 791-793, Zatta testimony); (Tr. 829-832, Denno testimony)* Denno stated that a move would be detrimental to Student:

. . . a move for [Student] would be a devastating thing to her life right now. To move her from a place where she is comfortable and familiar and quite successful, to a new place, that may or may not meet her needs, is a pretty scary thing.

I think that it would be very traumatic for her to learn a whole new set of people, a whole new communication, new routines, new routes, when she is so independent where she lives now and where she goes to school. Moving a blind student, learning your way around an area is really important, so I think it would be a very scary proposition.



(Tr. 829, lines 14-25)

As we noted in *FF#75*, MSB staff never determined that MSB could provide an appropriate educational program for Student.<sup>17</sup> Indeed, Dr. Howze, Superintendent of MSB, consistently maintained the position that MSB could not be made an appropriate placement for Student. She has stated that a MSB placement would not comply with the LRE because MSB has no peers with whom she could communicate. *FF#56*. Dr. Howze has further said “to have a good successful . . . fully rounded comprehensive program for this child we did not need to have her in isolation at MSB where we have kids who are blind and don’t sign.” *FF#56*.

While Barr has concluded that the presence of signing peers is not a requirement for LRE,<sup>18</sup> the U. S. Department of Education in Notice of Policy Guideline issued on October 26, 1992 arrives at the opposite conclusion emphasizing the critical importance of meeting the communication needs of a child who is deaf.<sup>19</sup> The Policy Guideline emphasizes:

. . . the communication nature of the disability is inherently isolating, with considerable effect on the interaction with peers and teachers that make up the educational process. This interaction, for the purpose of transmitting knowledge and developing the child’s self-esteem and identity, is dependent upon direct communication.

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<sup>17</sup>Significantly, neither DESE nor the District through deposition testimony or testimony at trial presented Linda Van Eck Niedringhaus as a witness. She is the Outreach Coordinator who has been with MSB for years and is familiar with Student’s needs. *FF#27*

<sup>18</sup>See Dr. Barr’s testimony at *Tr. 522, lines 8-11*.

<sup>19</sup>As noted in the Conclusions of Law #11, IDEA and 34 C. F. R. Section 300.346(b) directs an IEP team of a deaf child to consider communication with peers and professional personnel in the child’s language and communication mode. Student uses sign language to communicate with her peers at Perkins. None of the MSB students use sign language.



Even the availability of interpreter services in the educational setting may not address deaf children's needs for direct and meaningful communication with peers and teachers.

Meeting the unique and communication and related needs of a student who is deaf is a fundamental part of providing a free appropriate public education (FAPE) to the child. Any setting . . . that prevents a child who is deaf from receiving an appropriate education that meets his or her needs, including communication needs, is not the LRE for that individual child.

*Notice of Policy Guidance, U. S. Department of Education, October 16, 1992, pages 2 and 3.*

Neither the District nor DESE presented evidence (a) regarding the quality of services to be made available at MSB and (b) how the services provided by DESE would meet this Student's specific and unique needs. As noted in *FF#77*, the information provided about what would be needed at MSB to implement Student's IEP has been limited to general statements that the necessary staff would be hired, including one deaf/blind teacher and an interpreter who has signing capability as well as professional development and training.

#### *Placement at Perkins*

Once the District and DESE failed to establish MSB as an appropriate placement for Student, the burden shifted to the Parents to prove that Perkins is an appropriate placement. The Parents easily met their burden. DESE and the District offered no evidence to rebut the Parents on this issue.

As noted in *FF#59*, Student has complex needs in the areas of communication; functional academics; socialization and behavioral intervention. Student also must have access to close monitoring of health conditions (physical as well as psychological and emotional) by medical



personnel familiar with the CHARGE syndrome.<sup>20</sup> Student's IEP also requires: instructional services during all waking hours; a total communication environment in which all staff and students, with whom she is grouped, use total communication on a twenty-four hour basis; vocational settings for Student's deafblindness and structural behavioral intervention with attention to consistency across all environments.<sup>21</sup>

FF#63 details her experiences at Perkins and the advances she has made in all aspects of her life. Significantly, Perkins has the largest concentration of CHARGE students in the motion which allows this Student's very difficult needs to be met. The Panel concludes after hearing extensive testimony from the Parents regarding their daughter's experiences at Perkins and from staff members from Perkins describing the program and Student's progress as well as seeing two tapes of Student's experience in the classroom and in vocational settings that Perkins is an appropriate placement for Student.

*Missouri's "Severely Handicapped" Statute*

Since at least the beginning of school year 1997-1998, Student has met the definition of "severely handicapped" contained in Section 162.675(3) RSMo 2000, previously set out in Conclusion of Law #16. Since 1997-1998, the nature, severity, and combination of the Student's multiple disabilities and conditions has required that Student receive special educational services in a residential placement in order for meaningful progress toward educational goals to be

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<sup>20</sup>FF#60

<sup>21</sup>FF#62



realized. Since 1997-1998, Student has been unable to benefit from or meaningfully participate in programs in the public schools because of her disabilities. (*Stip¶ 8; Tr. 793, lines 19-25; 794, lines 1-6*)

Section 162.725 RSMo 2000 states in pertinent part as follows:

“162.725. State board to provide programs for severely handicapped children, when

1. The state board of education shall provide educational services for all severely handicapped children residing in school districts which are not included in special districts provided that such school districts are unable to provide appropriate programs of special instruction for severely handicapped children . . .

The clear wording of this statute provides that DESE assume responsibility for the education of severely handicapped children. Additionally, Section 162.735 RSMo 2000 provides that DESE may assign severely handicapped students to the state schools for severely handicapped children, the school for the blind or the school for the deaf. This Section further states that the state board of education:

“may contract for the education of a severely handicapped child with another public agency or with a private agency when the state department of elementary and secondary education determines that such an arrangement is in the best interests of the severely handicapped child. (*emphasis added*)

Section 162.735 RSMo 2000

DESE argued that a private placement under Section 162.735 is optional because of the term “may” contained in the Section. This argument is rejected for two reasons: (a) if a private placement is necessary to provide FAPE under the federal IDEA statute, then the Supremacy Clause of the U.S. Constitution requires that the federal statute must be followed instead of the



state statute and (b) statute violates the “funding neutral” provisions of IDEA (previously set out in Conclusion of Law #19). Therefore, under state law, DESE is responsible for the costs and expenses of Student’s placement as a severely handicapped student.

### **DECISION**

The District and DESE violated the procedural and substantive provisions of IDEA in directing the placement of Student at MSB. Student would not receive FAPE at MSB and therefore, MSB is not an appropriate placement for Student. The Parents have shown that Perkins is an appropriate placement for Student. Except for the local tax effort to be borne by the District, DESE is responsible for the costs and expenses for Student’s placement at Perkins for the school years 1998-1999 and 1999-2000.

The entire hearing panel joins in this Decision without dissent.

### **APPEAL PROCEDURE**

These Findings of Fact, Conclusions of Law, Decision and Order constitute a final decision in this matter. Any party aggrieved by the Decision of the Hearing Panel may, pursuant to Section 536 of the Missouri Revised Statutes, file an appeal to a state court within 30 days of the date of the Decision. An aggrieved party also has the option of pursuing a review of the Decision by the federal courts by filing a Petition within 30 days.